May 18, 2021

Kevin Beagan, Deputy Commissioner
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Jatin Dave, MD, MPH, Chief Medical Officer
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Re: Implementation of Telehealth Provisions under Chapter 260 of the Acts of 2020

Dear Deputy Commissioner Beagan and Dr. Dave,

On behalf of Health Care For All (HCFA) and Health Law Advocates (HLA), thank you for the opportunity to submit comments regarding implementation of the telehealth provisions of Chapter 260 of the Acts of 2020. We appreciate the efforts by the Division of Insurance ("the Division") and MassHealth to engage stakeholders in this process through listening sessions and an open opportunity to submit written comments. HCFA is also a member of the *t*MED Coalition and broadly supports the feedback provided by the coalition. HCFA and HLA would like to provide additional responses and comments regarding the questions and issues the Division and MassHealth raised during the listening sessions.

Carrier Communication with Members

HCFA strongly believes that the consumer protections included in Chapter 260 – and additional protections that the Division and MassHealth implement through guidance and regulation – should be clearly communicated to consumers so they understand the rights and restrictions for receiving health care services via telehealth. Consistent and accurate consumer information also relies on carrier communication with providers, who should be educated about health plan policies and practices pertaining to telehealth modalities. Written and oral communications should be widely accessible, taking into account factors including language, culture, disability, and literacy level. As a baseline, carrier, MassHealth, and managed care entity communications should be available in multiple languages and formats, ensuring accessibility for people with Limited English Proficiency (LEP), individuals who are deaf/hard of hearing and/or blind/visually impaired.

Cost-Sharing

Chapter 260 states that carriers may charge cost-sharing for services provided via telehealth as long as it does not exceed the cost-sharing for the in-person delivery of the same service. Just as with in-person services, it is crucial that health plan enrollees using telehealth understand their coverage and any cost-sharing associated with receiving specific services. Carriers should be held to the same existing obligations under M.G.L. c. 176O § 6 with regards to communicating cost-sharing information to members, which should include at a minimum a clear reference to the aforementioned

protections in Chapter 260 that prohibit higher cost-sharing for telehealth services and any allowable cost-sharing differences that carriers may choose to implement (e.g., waiving cost-sharing for certain/all telehealth services). Carriers and providers retain the obligation to provide consumers with cost estimates for certain services, which is applicable for in-person and telehealth care, as required under M.G.L. c. 176O § 23 and Chapter 224 of the Acts of 2012.

We support *t*MED's suggestions to encourage carriers to continue (or re-start) waiving co-pays for telehealth services through 90 days after the end of the public health emergency. Several carriers already resumed cost-sharing for services provided via telehealth in 2021, but carrier communication to enrollees about this change was inconsistent or non-existent. Many consumers learned about the return to cost-sharing through their providers (including a HCFA staff person). Any changes in cost-sharing policy, regardless of treatment modality, should be communicated to consumers as quickly and clearly as possible.

Receipt of Services via Telehealth

Health insurance carriers, MassHealth, and managed care entities should clearly communicate how receiving services via telehealth works, including any coverage limitations. This information should be part of plan summary documents and clearly indicated in a FAQ or telehealth information section on each carrier's website. In addition to cost-sharing and network information, consumers need to be informed about any restrictions, such as whether their telehealth encounter will be covered while temporarily visiting another state (e.g. for vacation or family obligations). In addition, while the primary responsibility is with the provider, carriers, MassHealth, and managed care entities should also inform members that they may decline receiving services via telehealth in order to receive in-person services, as stipulated in Chapter 260. Finally, carriers, MassHealth, and managed care entities should provide consumers with information about available technical and financial assistance that can help patients successfully engage in telehealth services, such as the Comcast Internet Essentials program.

Provider Network Status

Chapter 260 prohibits carriers, MassHealth, and managed care entities from meeting network adequacy through significant reliance on telehealth providers. Provider networks should not be considered adequate if patients are not able to access appropriate in-person services in a timely or geographically accessible manner, nor if coverage is limited to services provided by third-party telehealth providers. To the extent practicable, payers should include a clear indication in provider directories about whether a provider offers services via telehealth and whether a provider *only* provides services through telehealth. During its network adequacy reviews, the Division and MassHealth should closely analyze whether carriers and managed care entities are substantially relying on telehealth providers, especially national or third-party telehealth vendors rather than local providers who can provide services both via telehealth and in-person.

Telehealth Technology

Chapter 260 includes audio-only telephone in its definition of telehealth. The Division and MassHealth should work with carriers, managed care entities, and providers to ensure that audio-only telephone is available as widely as possible. Audio-only telephone access has been particularly useful in the provision of behavioral health services during the pandemic. The ability to connect with providers by telephone has also been an important way to ensure that consumers impacted by the so-called "digital divide" can access care. The digital divide refers to the gap between people who have ready access to computers or devices and sufficient internet connectivity and those who do not,

which can be tied to socioeconomic, sociocultural, technical knowledge, and other barriers. Some consumers may also feel more comfortable receiving telehealth services by phone due to issues such as privacy concerns and language access, or simply patient preference. Regardless of the platform or modality, interpreters must be available for LEP populations and those who are deaf or hard of hearing. Services provided through audio-visual means should additionally put accessibility measures into place for people who are blind or visually impaired.

Defining a Telehealth "Visit"

While we are not commenting on the overall definition of a visit, HCFA and HLA caution against any definition that would result in increased cost-sharing for consumers. Provider payment aside, cost-sharing is only relevant for encounters that entail providing care directly to and with the patient. For example, asynchronous communications and e-consults *between providers* should not result in any consumer financial liability. Similarly, individuals should not be charged cost-sharing for services such as calling a nurse triage line or requesting a prescription refill by phone. Further, separate standards of care should not be developed simply because a service is provided via telehealth. Providers should be held to the same standards whether services are provided in-person or through telehealth and work collaboratively with their patients to determine the best course of care and modalities for receiving that care.

Utilization Review for Telehealth

Chapter 260 states that utilization review, including prior authorization, may be used to determine coverage of services via telehealth as long as it is made in the same manner as determinations for in-person services. There should not be any additional requirements for prior authorizations or other utilization review to receive services through telehealth. In some instances, consumers may be able to access services via telehealth more quickly than in person, which should be taken into account with any utilization review processes.

Carriers must continue to comply with consumer protections under M.G.L. c. 176O and requisite Medicaid and Children's Health Insurance Program (CHIP) rules regardless of whether a service is provided in-person or through telehealth. Carriers are required to comply with the federal mental health and substance use disorder parity law; Medicaid and CHIP are also required to comply with parallel statutes and regulations that apply to those programs specifically. The parity law requires that non-quantitative treatment limits, such as prior authorization restrictions, must be "comparable to, and applied no more stringently than, the processes, strategies, evidentiary standards, or other factors used in applying the limitation with respect to medical/surgical benefits in the classification." 45 CFR 146.136(c)(4); 29 CFR 2590.712(c)(4). For example, restrictions on behavioral health services must be compared to those existing restrictions on medical services within the entire classification group, such as outpatient services.

Chapter 260 also made clear that a "health care provider shall not be required to document a barrier to an in-person visit" in the process of requesting or delivering telehealth services. Therefore, information or documentation of such barriers must not be included in the scope of the "necessary information" that relates to the medical necessity and appropriateness of the requested telehealth service. As with all decisions and determinations by carriers regarding medical necessity, the Division should remind carriers that the appropriateness of telehealth services requested in any individual circumstance must be evaluated in light of "the individual health care needs of the insured," as required under M.G.L. c. 176O § 16(b). Thus, the Division should advise carriers to focus on information regarding the "individual health care needs of the insured" and how the proposed telehealth services could meet those needs. Disclosure notices should clearly indicate how

utilization review processes apply to receipt of care via telehealth, including a statement that refers to language within Chapter 260 that telehealth services are covered in the same manner as in-person services with regards to prior authorizations and other utilization management processes.

Denials and Appeals

The processes for telehealth denials, appeals, disclosures, reconsiderations, and expedited reviews should be the same as for in-person services, including a consumer's right to appeal a denial of receiving care through telehealth. We request that the Division also explore a more permissive policy to allow expedited review for denials of receiving services via telehealth. A consumer may be forced into the difficult position of choosing to wait to receive in-person services, potentially putting themselves at risk in order to fully assert their appeal rights, and receiving an appeals decision about telehealth access for the services. At the same time, a consumer should also have the right to choose to receive any service in-person at any point.

Carriers should work to ensure that their customer service and appeals department staff understand that a denial of telehealth as a method of receiving a service does not necessarily mean that the service itself is denied or not covered under the plan. However, it is clear that such a determination by a carrier is really an exercise of medical judgement under the "appropriateness" requirement under Chapter 260. Therefore, in order to safeguard consumer appeal rights under M.G.L. c. 176O § 14, in light of expanded access to telehealth under Chapter 260, we request that the Division require carriers to be clear in their denial letters or denial notices that any prior authorization denial of telehealth services by the carrier regarding whether "the health care services may be appropriately provided through the use of telehealth" under M.G.L. c. 176G, § 33(b)(ii) is an exercise of medical judgement by the carrier that is subject to external review by Office of Patient Protection under M.G.L. c. 176O § 14. In addition, we respectfully request that the Division collaborate with the Health Policy Commission to exercise its authority under M.G.L. c. 6D § 18 to issue regulations to implement this policy as an external review appeal right under chapter M.G.L. c. 176O § 14.

Thank you for your time and consideration of the issues raised in this letter regarding implementation of telehealth provisions in Chapter 260 of the Acts of 2020. Please do not hesitate to contact us with any questions or to discuss these comments further.

Sincerely,

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